Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

MARIO UDASCO DALO,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE VIRGINIA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Virginia Supreme Court erred in finding that, where a defendant has already been convicted of violating Virginia Code Ann. § 18.2-266 (DUI) under "subsection (ii), (iii) or (iv)", a conviction for violation of § 18.2-36.1(A) (involuntary manslaughter), premised on the very same DUI conviction, is not barred by and constitute double jeopardy.

2. Whether the Virginia Supreme Court erred in finding that the lower court was correct in overruling Petitioner's (hereinafter referred to as "Dalo") motion dismiss the involuntary manslaughter indictment based on double jeopardy principals on the basis of non-existent legislative intent that the lower court said authorized it to impose multiple punishments for the same criminal conduct in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

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OPINIONS BELOW

The November 1, 2002 final ruling of the Virginia Supreme Court, whose judgment is herein sought to be reviewed is published without opinion and is reprinted in the appendix of this petition at page 1a. The prior ruling by the Virginia Court of Appeals, which was affirmed by the above referenced ruling by the Virginia Supreme Court, was accompanied by a published opinion at 554 S.E.2d 705 (2001) and is reprinted in the appendix of this petition at pages 3a-15a. The prior opinion of the Virginia Beach Circuit Court dated October 4, 2000 from which this appeal arose was not published nor accompanied by an opinion but such order is reprinted in the appendix to this petition at pages 19a-21a.

STATEMENT OF JURISDICTION

The judgment of the Virginia Supreme Court was entered on November 1, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth Amendment of the United States Constitution. The Fifth Amendment states in pertinent part:

> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

The Fourteenth Amendment states in pertinent part:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The facts in this case are relatively uncontroverted (*see* the Stipulation of Facts at page 132-133 of Joint Appendix[1] and recitations in both the Commonwealth and the Appellant's briefs Joint Appendix pages 42 and 49). The Commonwealth's evidence showed that on October 5, 1999, the defendant's vehicle struck and killed a pedestrian in the Chick's Beach section of the City of Virginia Beach. The appellant, who had just been fishing underneath a local bridge, was pulling into the westbound lane of Shore Drive from East Stratford Drive just west of the Lesner Bridge. The Appellant stated to arresting officers that he had swerved to avoid oncoming traffic when he went off the road and struck the victim who was walking west away from the Lesner Bridge with a friend. The Appellant stayed at the scene while emergency and police personnel were dispatched. The Appellant was charged first with DUI under Virginia Beach City Code § 21-336 and then involuntary manslaughter under Virginia Code Ann. § 18.2-36.1(A) which incorporates as an essential element, and is premised upon, "driving while under the influence in violation of subdivision (ii), (iii), or (iv) of § 18.2-266". Prior to trial on the DUI, the Commonwealth amended the DUI warrant to the corollary state code section of "§ 18.2-266(ii), (iii), (iv)" and, more

1. Joint Appendix as filed with the Supreme Court of Virginia, Record No. 020321.

importantly, the Commonwealth Attorney specifically redlined all the verbiage from the warrant pertaining to subsection "(i)" so as to tailor the DUI warrant to match the language in § 18.2-36.1(A). In other words, the DUI warrant was changed so that there would be no question but that a DUI conviction would fit squarely into an essential element of the involuntary manslaughter charge at trial in circuit court (*see* Joint Appendix page 92, lines 1-10, and page 98, lines 9-21).

On December 9, 1999, the General District Court convicted the defendant of DUI under the amended code section and the Appellant served a six (6) month active jail sentence for that charge, his first traffic conviction (*see* Joint Appendix page 147). The involuntary manslaughter charge was certified and set to be heard on March 14, 2000 in the Virginia Beach Circuit Court. Prior to March 14, 2000, however, the Appellant filed a Plea of Former Jeopardy, moving the court to dismiss the felony indictment, and the matter was set to be heard on the date originally set for trial, March 14, 2000. Prior to that hearing, both parties filed briefs and they were made part of the record.

In that hearing, the trial court narrowed the issues significantly. First, the parties agreed that their were two main issues to address in the context of Appellant's argument taken in reverse order, to-wit: First, whether, in the context of *Blockburger v. United States*, 284 U.S. 299, 304 (1932), the DUI as amended and statutory involuntary manslaughter stand in relation to each other as a lesser included and greater offence, and, second, whether the legislature, in the context of *Fitzgerald v. Commonwealth*, 11 Va. App. 626, 628, *aff'd*, 13 Va. App. 281 (1991), has clearly indicated its intent to impose multiple punishments in a case such as this, thereby negating the double jeopardy question (*see* pages 68-69 of Joint Appendix).

The Commonwealth conceded, eventually, and the lower court found that these two charges, if the *Blockburger* test were applied, would fail the test since they stand in relationship to each other as a lesser included and greater offense (*see* pages 93 through 94, *see* particularly lines 21-24, of Joint Appendix).

Accordingly, the only issue left for consideration by the lower court after the March 14, 2000 hearing was, in the court's own words, "whether the General Assembly has authorized the court to impose multiple punishments for two offenses arising out of the same criminal conduct in the context of this particular case." (*See* page 126 of Joint Appendix). The lower court continued the hearing to May 2, 2000 and requested supplemental briefs that were filed and made part of the record.

On May 2, the lower court overruled Appellant's motion to dismiss the indictment finding that there was clear legislative authorization, (based on "gradation" and the fact that two separate code sections exist), for double punishment for the same criminal conduct in this particular case (*see* pages 127–129 of Joint Appendix).

The Appellant was convicted in the Virginia Beach General District Court, Criminal Division, on December 9, 1999 of misdemeanor DUI under Virginia Code Ann. §§ 18.2-266 "(ii), (iii) or (iv)" and sentenced to an active jail sentence in the Virginia Beach City Jail of six (6) months, with no time suspended, and in the Virginia Beach Circuit Court on October 4, 2000 on one count of involuntary manslaughter under Virginia Code Ann. § 18.2-36.1(A) to ten (10) years in the Virginia State Penitentiary with all but six (6) years suspended conditioned on upon good behavior for ten (10)

years and payment of court costs fines and restitution. Appellant noted his appeal and remained on bond.

The Court of Appeals, in its February 28, 2001 opinion, granted Appellant's appeal, in part and denied in part. The two questions that remained were the same legal questions presented in this Petition. The Court heard oral arguments and ruled on November 20, 2001, in favor of the Commonwealth. The Appellant timely filed a Motion to Rehear En Banc which was dismissed on January 25, 2002. The Appellant timely filed his Notice of Appeal to the Virginia Supreme Court and the granting of Appellant's appeal occurred on May 8, 2002. The Virginia Supreme Court affirmed the lower court on November 1, 2002 but stayed their mandate by order of January 2, 2003. The trial court, on motion of the Commonwealth and over the objection of Dalo, revoked his appellate bond and he was remanded to jail.

REASONS FOR GRANTING THE PETITION

I. The Virginia Supreme Court, In Affirming The Virginia Court Of Appeals, Failed To Recognize And Redress Clear And Unambiguous Violations Of The Fifth And Fourteenth Amendments In The Lower Court Rulings.

Virginia Code Ann. § 18.2-36.1(A) states, in pertinent part, that someone is guilty of involuntary manslaughter when:

> Any person who, *as a result of driving under the influence in violation of subdivision (ii), (iii) or (iv) of Section 18.2-266*, unintentionally causes

> the death of another person, shall be guilty of involuntary manslaughter.

(Emphasis added). Prior to the enactment of this provision in 1989, manslaughter cases involving drunk driving were always prosecuted under the traditional common law principals based on killings resulting from some unlawful, but not felonious, act. *See, e.g., Beck v. Commonwealth*, 216 Va. 1, 4, 216 S.E.2d 8 (1975). The enactment of this new statute eliminated the Commonwealth's burden of proving criminal negligence by creating a presumption that anyone who operates a motor vehicle in violation of § 18.2-266 is, by definition, criminally negligent.

Accordingly, by making driving in violation of §§ 18.2-266 "(ii), (iii) or (iv)" an essential element of involuntary manslaughter, driving in violation of any of those subdivisions is, by definition, a lesser included offense. A lesser included offense is one that is composed entirely of elements that are also elements of the greater offense. *Graves v. Commonwealth*, 21 Va. App. 161, 165, 462 S.E.2d 902 (1995). A conviction on the greater offense will always be effectuated by the necessary proof of the lesser included offense and, therefore, no defendant will be convicted of statutory involuntary manslaughter without the court first finding him in violation of §§ 18.2-266(ii), (iii) or (iv).

The double jeopardy provisions of the Fifth Amendment to the United States Constitutions protect an accused against multiple punishments for the same offense. U.S. Const., Amdt. 5. *See, e.g., Chaine v. Commonwealth*, 17 Va. App. 179, 183, 430 S.E.2d 187 (1993). Offenses are the same for double jeopardy purposes if one is a lesser included offense of the other. *Id.*, quoting, *Blockburger v. United States*, 284

U.S. 299, 304 (1932) ("where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision required proof of a fact which the other does not."). This Court has concluded that where two offenses for which the defendant is to be punished cannot survive the "same-elements" test, the double jeopardy bar applies. *See, e.g., Brown v. Ohio*, 432 U.S. 161, 168-169 (1977).

The *Blockburger* different-elements test is to be applied in both cases where the offenses are tried together, or simultaneous, and when the offenses are tried separately, or successive. However, in this case, whether these proceedings were successive or simultaneous, the result is the same.

In a simultaneous proceeding, if the trial judge decides that two convictions before him after one trial do not survive the *Blockburger* different-elements test, he must vacate one or the other. Merely imposing concurrent sentences does not cure the evil of more than one punishment. *Ball v. United States*, 470 U.S. 856, 846, 105 S. Ct. 1668, 1673, 84 L. Ed. 740 (1985); *Jones v. Commonwealth*, 218 Va. 757, 759, 240 S.E.2d 526 (1978). However, because a conviction in Virginia courts can only be vacated within 21 days after it becomes final (after a sentence is imposed), the DUI conviction, as of the March 13, 2000 hearing date, could not have been vacated since the defendant's conviction became final more than 21 days from that date and, further, because the defendant did not receive a suspended sentence. *See* Rule 1:1 of the Rules of Virginia Supreme Court 1950, as amended. Once again, the lower court ruled, and it was eventually the Commonwealth's position, that the offenses, as worded in the DUI warrant and the felony indictment, failed the

Blockburger test and focused, instead, on whether there existed some other reason why double jeopardy principles were not offended.

Assuming these proceedings were simultaneous and Dalo had already been tried for a lesser included offense, then there existed an *apparent* violation of the double jeopardy clause when the lower court proceeded with the felony indictment. *Price v. Georgia*, 398 U.S. 323, 327, 90 S. Ct. 1757, 1760, 26 L. Ed. 2d 300 (1970). The word "apparent" was emphasized above because the Blockburger need not be reached where the state legislature has shown its clear intention to allow for double punishments for the same conduct or series of events. *Garrett v. United States*, 105 S. Ct. 2407, 2411-12 (1985). Similarly, Virginia cases have espoused a "jurisdictional exception" to the double jeopardy clause where a legislative intent to allow double punishment exists. *Fitzgerald v. Commonwealth*, 223 Va. 615, 635 (1982), *cert denied*, 459 U.S. 1228, 103 S. Ct. 1235, 75 L. Ed. 2d 465 (1983). In any such case, however, it is presumed that a legislature does not intend to impose two punishments where two code sections punish conduct making up the "same offense". *Rutledge v. United States*, 517 U.S. 292, 297 (1996), *citing Whalen v. United States*, 445 U.S. 684, 691-692 (1980) and *Ball v. United States*, 470 856, 861 (1985).

In the instant case, whether the proceedings were simultaneous or successive is irrelevant since the narrowed double jeopardy problem existed in either case, unless there was clear legislative intent to allow for the double punishment. There is no such legislative intent found in either code section and therefore double jeopardy principals should have barred the felony indictment on the greater offense. However, the lower court found such an intent, despite any

language or authority to rely on this conclusion, and it was error for the appellate courts to affirm same.

As mentioned above, where there exists a clear legislative intent to allow multiple punishments for offenses that otherwise would not pass the *Blockburger* test, double jeopardy principals are not offended. *Missouri v. Hunter*, 459 U.S. 359, 366 (1983). In other words, a legislature can carve out exceptions to double jeopardy by merely stating so in a statute. However, that legislative intent must be clear and unambiguous and must speak to the type of offenses that are to be multiple. In the Virginia case, *Turner*, for example, the court states that:

> [t]he General Assembly has clearly indicated its intent to impose multiple punishments for capital murder and use of a firearm in the commission of a felony. Code § 18.2-53.1 "shall be separate and apart from, and shall be made to run consecutively with, any punishment received for the commission of the primary felony." *Turner v. Commonwealth*, 221 Va. 513, 530, 273 S.E.2d 36 (1980).

Thus, even though the two offenses in *Turner* would fail the *Blockburger* different-elements test, the defendant's double jeopardy claim failed because of the "unambiguous intent to authorize multiple punishments for a single criminal transaction." *Id.*

In this case, there simply is no clear, unambiguous language in § 18.2-36.1 that the legislature intends to authorize multiple punishments for DUI and statutory involuntary manslaughter arising out of a single transaction. There is, in subsection "C", the authorization of "prosecution under any other homicide statute" and any "other revocation or suspension required by

law", however, this does not authorize multiple punishments for DUI (as discussed below).[2]

II. The Virginia Supreme Court Erred In Affirming The Lower Courts' Findings And In Overruling Dalo's Plea Of Former Jeopardy Based On Their Misplaced Belief That The Virginia General Assembly Has Authorized Virginia Courts To Impose Multiple Punishments For Two Offenses Arising Out Of The Same Criminal Conduct In This Particular Case.

The Virginia Supreme Court, in affirming the Virginia Court of Appeals, found authorization for multiple punishments in this case based on two erroneous grounds. First, it said that the insertion of the DUI language in the involuntary manslaughter code section only serves to "grade" the offense (*see* Joint Appendix at page 128). Second, it found legislative authorization based on the fact that there were two separate statutes. Specificaliy, the lower court stated,

> By its enactment of these two separate statutes, which punish the distinct acts of intoxicated driving and unlawful killing, the General Assembly has expressed its intent to impose multiple punishments for these two acts.

See Joint Appendix at pages 128-129.

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2. Other examples of "clear and unambiguous language" of Virginia legislative intent to allow for double punishments are found throughout the Code. For example, in Va. Code Ann. § 18.2-255.2, in subsection "C", the legislature makes it clear that "any prosecution" for another violation arising out of the same act is authorized. Accordingly, a conviction for possession of drugs with intent to distribute on school grounds will not bar a conviction for possession of drugs with the intent to distribute arising out of the same act.

This type of argument, supported by the appellate courts in their affirmations of the lower court opinion, has been addressed and rejected by this Court in *Rutledge v. United States*, 517 U.S. 292, 304 (1996). In *Rutledge*, the Government used the same flawed logic as quoted above in their position that the "convictions are authorized for both §§ 846 and 848 [21 USC] because they are different sections of the United States Code." *Id.* This Court, in rejecting this argument, stated:

> This does not rise to the level of the clear statement necessary for us to conclude that despite the identity of the statutory elements, Congress intended to allow multiple punishments. After all, we concluded in *Ball* that the statutes at issue did not authorize separate convictions, and they were even more distinct in the Code. *Id.*

The Virginia Court of Appeals, whose opinion was wholly affirmed without explanation by the Virginia Supreme Court, correctly found that the analysis must begin with the plain language found within the statue itself. *Dalo v. Commonwealth*, 37 Va. App. 156, 165, 554 S.E.2d 705 (2001) (*see* Joint Appendix at page 229). However, the appellate court then went on to erroneously adopt the Commonwealth's argument regarding gradation in gleaning otherwise non-existent legislative intent from the involuntary manslaughter statute. *Id.* at 166-169 (*see* Joint Appendix at 230-234).

Gradation, like that found in the felony homicide cases, does not apply to this case. In felony murder cases, the only reason proof of the underlying felony is required is to grade the homicide for punishment purposes. *Fitzgerald v. Commonwealth*, 223 Va. 615, 636 (1982). Without the

underlying felony, the crime for the killing is graded down or lessened in severity (in the example given by the Commonwealth in its brief, felony homicide under Virginia Code Ann. § 18.2-33, without the felony, there still exists an unintentional killing which could then be prosecuted as manslaughter). That is patently different from the case here since the only reason the DUI language was placed within the involuntary manslaughter statute was to lessen the Commonwealth's burden in proving its case. In a trial on the felony, if you can prove the DUI under subsections "(ii), (iii) or (iv)" of the DUI statute, you have proved the essential element of criminal negligence.

Subsections "(ii), (iii) or (iv)" of § 18.2-266 was not placed within § 18.2-36.1 to make that crime a felony nor was it placed there to enhance the grade of the crime as in felony homicide statutes. Involuntary manslaughter has always been punishable as a felony, regardless of the conduct constituting causation (*i.e.* criminal negligence). Thus, as the lower court seemingly originally recognized (*see* Joint Appendix at pages 88-89, specifically, starting with line 15 on page 88 through line 21 on page 89), the placement of § 18.2-266 language within the involuntary manslaughter statute was done so in order to eliminate the need for the Commonwealth to prove an essential element, namely criminal negligence, in its prima facia case. The Commonwealth erroneously argued that without such language, the crime of manslaughter would only be a civil tort. However, such language does not function to upgrade or even make involuntary manslaughter a felony; it simply makes the Commonwealth's job a little easier when proving its case *under this particular statute*. Without proof of the DUI, the crime of manslaughter does not somehow grade down to a lesser offense, as in a case of felony homicide, and there still exists the crime of common law involuntary manslaughter (albeit with the requirement that the Commonwealth prove its case the old fashion way).

The appellate courts' adoption of the Commonwealth's felony murder analogy is misplaced. The legislature enacted the creation of a new and separate crime when it passed the felony murder law. Because of this, the principal reason for reference of the felony in the felony murder statute is simply gradation and courts have ruled that the Commonwealth may prosecute both felonies. Further, there is no punishment inherent in the statute for the underlying felony since its only purpose is to grade the offense. In contrast, the underlying criminal act in the statutory involuntary manslaughter statute is always a DUI, which is a misdemeanor, and for which there is punishment contemplated for both acts The statute is intended to punish the defendant for both the unintended death and the act of DUI, together, as one felony (unlike the felony murder example, there is no "Felony DUI" created as a result of a death, rather, the DUI is incorporated in the manslaughter statute and in the punishment therefore). This is clearly not the aim of the felony murder statute since it punishes only for the killing, not the underlying felony as well. The legislative intent to allow two punishments is therefore clear.

A more proper analogy would be that of malicious wounding and assault and battery (or the robbery and larceny example given in the Dalo's opining brief in lower court). It is impossible to commit a crime of malicious wounding without first committing the offense of assault and battery. Yet it would be ridiculous to convict each person who commits an act of malicious wounding of both the felony and the misdemeanor. In the felony murder analogy, the crimes are separate and distinct, but committed at the same time. There is no reason why a conviction for one should negate the other. In this case, the DUI is integrally part of the killing, and the result thereof. It is not the same nor should be a guide to glean otherwise non-existent legislative intent.

The Court of Appeals likewise erroneously argues the murder statutes analogy. *Dalo v. Commonwealth*, 37 Va. App. 156, 166, 554 S.E.2d 705 (2001) (*see* Joint Appendix at page 230). This argument also fails for the above reasons. The placement of the language "in the commission of, or attempt to commit, arson, rape, forcible sodomy, inanimate or animate object sexual penetration, robbery, burglary or abduction" in Va. Code Ann. § 18.2-32 does indeed supply the requisite "malice" required as an element of first degree murder. However, just as in the felony murder example, the predicate offense is a wholly separate act, punishable in and of itself, that only serves to grade the killing.

III. Legislative Intent Must Be Clear And Unambiguous.

The legislative intent required in this case is that which *authorizes* multiple punishments, not the other way around. This Court has been clear and consistent in mandating that legislative circumvention of a *Blockburger* problem must be proactive and that legislative subversion of the double jeopardy clause must be "specially authorized". *Whalen v. United States*, 445 U.S. 684, 688 and 693 (1980). In other words, the legislature must state when multiple punishments are authorized; they do not have to state, as the Commonwealth argues, when they are prohibited. It would certainly be convenient for the Commonwealth to be able to dodge federal constitutional issues simply by pointing out that our own state legislature has not reiterated already vested constitutional rights, however, this would be absurd. It means absolutely nothing that the Virginia General Assembly has failed to state, within the Code, what is already a federal and state constitutional right against multiple punishments arising out of the same conduct.[3]

3. The Commonwealth also argued that this Court does not find merit in Dalo's argument since It has not addressed the issue in other (Cont'd)

Accordingly, the fact that there exists two distinct code sections for DUI and involuntary manslaughter is irrelevant and certainly not a basis for inventing legislative intent that multiple punishments under the two code sections are authorized. Following the lower court's reasoning, the mere existence of the larceny and robbery statutes in the Virginia Code means the "General Assembly has expressed its intent to impose multiple punishments for these two acts" arising out of the same conduct. Under this scenario, as with many other offenses that fail *Blockburger*, double jeopardy principals would bar a second conviction. *See Clayton Motors v. Commonwealth*, 14 Va. App. 470, 472-473, 417 S.E.2d 314 (1992).[4]

In its initial lower court brief, it's Brief in Opposition for a Writ of Error, and Opening Brief on Appeal, the Commonwealth argued that the legislative intent lies in subsection "C" of the manslaughter statute. The Court of Appeals did not address this argument, however, the subsection itself is important and the implications of the language *not* found in the subsection were erroneously lost

(Cont'd)

cases with similar facts and "did not take the opportunity to state that any double jeopardy rule was violated" (*see* page 9 of Appellee's Brief in Opposition of Petition for Writ). This argument is without merit, to-wit: In the case cited, *Castillo v. Commonwealth*, 21 Va. App. 482, 465 S.E.2d 146 (1995), this issue was never raised on appeal (*see Castillo* at 482) and this Court will not address an issue not raised on appeal. *Ohree v. Commonwealth*, 26 Va. App. 299, 308, 494 S.E.2d 484, 488 (1988).

4. For other examples, *see Darnell v. Commonwealth*, 12 Va. App. 948, 408 S.E.2d 540 (1991) involving petit larceny and credit card theft; *Chaine v. Commonwealth*, 17 Va. App. 179, 436 S.E.2d 187 (1993) involving forcible sodomy and carnal knowledge.

on the Court. A logical interpretation of subsection "C" is that a DUI prosecution arising out of the same facts is *not* authorized due to its conspicuous absence in the subsection, either directly or indirectly. If there were to be a legislative intention to authorize multiple punishments for DUI and a violation of this statute, there is no doubt that it would be located in subsection "C" of the involuntary manslaughter statute, for obvious reasons. The Commonwealth argued, and the lower court took the position, that the legislature *should* have put such language in subsection "C", however, this is irrelevant (*see* Joint Appendix pages 94-95). As Dalo argued on page four (4) of his Reply to Supplemental Brief in Opposition in the trial court proceedings (*see* Joint Appendix pages 123-124), Virginia courts are only authorized to determine "the legislative intent by what the statute says and not by what we think it should have said". *Turner v. Wexler* 244 Va. 124, 418 S.E.2d 866 (1992) *quoting Carter v. Nelms*, 204 Va. 338, 131 S.E.2d 401 (1963). More importantly, however, the maxim *expressio unius est exclusio alterius* controls when analyzing § 18.2-36.1 and specifically subsection "C" therein. This maxim has been recognized by the Virginia Supreme Court and "provides that mention of a specific item in a statute implies that omitted items were not intended within the scope of the statute." *Turner* at 127 quoting *Tate v. Ogg*, 170 Va. 95, 103, 195 S.E. 496 (1938). Thus, since there is no mention of § 18.2-266, directly or indirectly in that portion of the involuntary manslaughter statute dealing specifically with multiple punishments (i.e. "C"), there exists a clear implication that it was omitted intentionally and therefore not authorized for double punishment purposes. Under Va. Code Ann. § 46.2-389, enacted years before the date of this offense, a person convicted of statutory involuntary manslaughter has their license suspended. That is what the statute is referring to in subsection "C" when it authorizes other revocations or suspensions.

The Commonwealth consistently argued that the result sought by the Appellant in this case was "absurd". The Court of Appeals, on pages 168-169 of the published opinion, similarly suggests that such a result results in an unwarranted "windfall" (*see* Joint Appendix at pages 233-235). The absurdity in this particular case is that Dalo was prosecuted for the DUI in the first place. The General Assembly obviously intended that one who, as a result of driving under the influence, unintentionally killed another would be prosecuted under Va. Code Ann. § 18.2-36.1. In doing so, the legislature took the necessary steps to accomplish punishment for the entire act, including what would otherwise be a misdemeanor. Therefore, a defendant in such a prosecution under the felony, such as Dalo in this case, is adequately punished for the DUI when he is convicted and sentenced for the violation of the felony. The fact that the lesser included offense of DUI provides a quasi "back-up" conviction should the greater offense not be found is a baseless argument. *See, e.g., Rutledge v. United States*, 517 U.S. 292, 305 (1996).

The Virginia General Assembly obviously knows how to draft statutes that call for multiple punishments as seen in examples cited by both Dalo and the Commonwealth throughout these proceedings. They did not memorialize such an authorization in this case and they certainly never contemplated that any prosecutor would seek to convict a defendant of a lesser included misdemeanor while at the same time pursuing a conviction for the felony that was specifically tailored to punish the defendant's entire criminal behavior, both misdemeanor and felony.

CONCLUSION

In affirming the lower court's conviction in this case, the Virginia Supreme Court violated Dalo's Fifth and Fourteenth Amendments in allowing him to be twice punished for the same offense without any clear authorization from the Virginia General Assembly. Accordingly, Dalo respectfully requests this Court grant his writ and reverse his conviction.

Respectfully submitted,

STEVEN C. FRUCCI
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APPENDIX

APPENDIX A — OPINION OF THE VIRGINIA SUPREME COURT DATED NOVEMBER 1, 2002

FROM THE VIRGINIA SUPREME COURT

Record No. 020321

PER CURIAM
November 1, 2002

PRESENT: Carrico, C.J., Lacy, Hassell, Koontz, Kinser, and Lemons, JJ., and Compton, S.J.

MARIO UDASCO DALO

v.

COMMONWEALTH OF VIRGINIA

In this appeal, the Court reviews a judgment of the Court of Appeals of Virginia which affirmed a circuit court judgment convicting the accused of involuntary manslaughter, in violation of Code § 18.2-36.1, after he had been convicted of driving while intoxicated, in violation of Code § 18.2-266, based upon the same evidence. *Dalo v. Commonwealth*, 37 Va. App. 156, 554 S.E.2d 705 (2001).

The Court of Appeals held that double jeopardy principles did not bar the conviction of involuntary manslaughter following the conviction of driving while intoxicated.

Appendix A

For the reasons set forth in the opinion of the Court of Appeals, we will affirm that court's judgment.

Affirmed.

APPENDIX B — OPINION OF THE COURT OF APPEALS OF VIRGINIA DATED NOVEMBER 20, 2001

COURT OF APPEALS OF VIRGINIA

Record No. 2524-00-1

PRESENT: Judges Bray, Frank and Clements
Argued at Chesapeake, Virginia

MARIO UDASCO DALO

v.

COMMONWEALTH OF VIRGINIA

OPINION BY
JUDGE ROBERT P. FRANK
NOVEMBER 20, 2001

FROM THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH
A. Bonwill Shockley, Judge

Mario Udasco Dalo (appellant) was convicted in a bench trial of involuntary manslaughter, in violation of Code § 18.2-36.1(A). On appeal, he contends this conviction violated the principles of double jeopardy because he also was convicted of driving while under the influence (DUI), in violation of Code § 18.2-266, based on the same evidence. After consideration of the legislative scheme and implicit intentions of the General Assembly, we affirm the involuntary manslaughter conviction.

Appendix B

BACKGROUND

The facts are not in controversy.

On the evening of October 5, 1999, appellant was driving on Shore Drive in the City of Virginia Beach when he struck James Cone and Kathy Phelan, who were walking beside the road. Cone was injured, but not fatally. Phelan was alive at the scene, but later died from her injuries.

When Virginia Beach Police Officer Scott Bishop arrived at the scene, he found appellant's speech was slurred, his eyes were glassy, and he swayed as he stood. Appellant also smelled of alcohol and could not pass a number of field sobriety tests. Appellant admitted he had consumed alcohol that evening. A breath test revealed his blood alcohol level was .11.

Appellant was charged with involuntary manslaughter under Code § 18.2-36.1(A)[1] and with DUI. The preliminary

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1. A defendant found guilty under Code § 18.2-36.1(A) is "guilty of involuntary manslaughter" and can be sentenced to up to ten years of imprisonment with no mandatory minimum. *See* Code §§ 18.2-10(e) (a defendant convicted of a Class 5 felony can be sentenced to no "more than ten years"); 18.2-36 (involuntary manslaughter is a Class 5 felony); 18.2-36.1(A) (defining a violation of this section as "involuntary manslaughter"). Under Code § 18.2-36.1(B), "[i]f, in addition [to the elements in (A)], the conduct of the defendant was so gross, wanton and culpable as to show a reckless disregard for human life, he shall be guilty of aggravated involuntary manslaughter, a felony punishable by a term of imprisonment of not less than one nor more than twenty years, one year of which shall be a mandatory, minimum term of imprisonment."

hearing and trial for these charges were held together in general district court on December 9, 1999. The DUI warrant originally recited a violation of the Virginia Beach City Code. The prosecutor amended the warrant to reflect a violation of Code § 18.2-266(ii), (iii), or (iv). The language on the DUI warrant that referred to Code § 18.2-266(i), allowing convictions based on a blood alcohol concentration of .08 or more, was struck by the prosecutor. The district court convicted appellant of the amended DUI charge and certified the manslaughter charge to the grand jury. The grand jury returned a true bill of indictment on January 4, 2000.

In the circuit court, appellant moved to dismiss the indictment on double jeopardy grounds. After both parties briefed the issue, the trial court heard argument on March 14, 2000. During the hearing, the Commonwealth "stipulated" that "these two offenses don't pass [the *Blockburger v. United States*, 284 U.S. 299 (1932),] test." On May 2, 2000, the trial court denied the motion to dismiss.

In ruling that double jeopardy principles did not bar prosecution of the involuntary manslaughter charge under Code § 18.2-36.1, the trial court found the General Assembly intended to impose multiple punishments "for the unlawful killing of another in violation of Code § 18.2-36.1 and for the crime of driving while intoxicated in violation of Code § 18.2-266(ii), (iii) and (iv)." The trial court further found that the reference in Code § 18.2-36.1 to Code § 18.2-266(ii), (iii) and (iv) served only to "grade this offense of manslaughter, distinguishing it from the offense of common law involuntary manslaughter."

Appendix B

ANALYSIS

Appellant contends he was twice placed in jeopardy for the same offense when he was convicted of involuntary manslaughter following his DUI conviction. Essentially, appellant argues that his DUI conviction, which the Commonwealth at trial conceded is a lesser-included offense of involuntary manslaughter under Code § 18.2-36.1, precludes prosecution of the greater offense.

The Fifth Amendment protection against double jeopardy includes "three separate guarantees: (1) 'It protects against a second prosecution for the same offense after acquittal. [(2) I]t protects against a second prosecution for the same offense after conviction. [(3)] And it protects against multiple punishments for the same offense.' " *Illinois v. Vitale*, 447 U.S. 410, 415 (1980) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)). This appeal involves only the question of whether appellant received multiple punishments for the same offense.[2]

Generally, to determine whether charges are for the "same offense," courts turn to the test established in *Blockburger*. For example, the Supreme Court noted:

> In *Brown v. Ohio*, 432 U.S. 161 (1977), we stated the principal test for determining whether two offenses are the same for purposes of barring

2. The charges were instituted at the same time; therefore, this appeal does not involve successive prosecutions. *See Phillips v. Commonwealth*, 257 Va. 548, 551-52, 514 S.E.2d 340, 342 (1999).

> successive prosecutions. Quoting from *Blockburger v. United States*, 284 U.S. 299, 304 (1932), which in turn relied on *Gavieres v. United States*, 220 U.S. 338, 342-343 (1911), we held that " '[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.' " 432 U.S., at 166.

Vitale, 447 U.S. at 416.

However, in this case, the Commonwealth conceded "these two offenses don't pass that test." Therefore, the Commonwealth is barred from arguing *Blockburger* on appeal, and this Court will not apply that test here.[3] *See Johnson v. Commonwealth*, 26 Va. App. 674, 683, 496 S.E.2d 143, 147 (1998) (finding the Commonwealth conceded at trial that an exception to the warrant requirement for searches did not apply and, therefore, the exception could not form the "basis for affirmance on appeal").

This concession does not mandate the outcome of this appeal, however, because *Blockburger* is not controlling. "[S]imply because two criminal statutes may be construed

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3. Because the Commonwealth at trial conceded DUI was a lesser-included offense, we do not address whether DUI is a lesser-included offense of involuntary manslaughter under Code § 18.2-36.1. However, this concession is not determinative of our analysis. *See infra.*

to proscribe the same conduct under the *Blockburger* test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes." *Missouri v. Hunter*, 459 U.S. 359, 368 (1983). As the Supreme Court explained:

> The rule stated in *Blockburger* was applied as a rule of statutory construction to help determine legislative intent. Significantly, after setting out the rule, the Court cited a paragraph in *Albrecht* [*v. United States*, 273 U.S. 1, 11 (1927)], which included the following statement: "There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and *punishing also the completed transaction*" (emphasis added). We have recently indicated that the *Blockburger* rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history. *Missouri v. Hunter*, 459 U.S. 359, 368 (1983); *Albernaz v. United States*, 450 U.S. 333, 340 (1981); *Whalen v. United States*, 445 U.S. 684, 691-92 (1980). Indeed, it would be difficult to contend otherwise without converting what is essentially a factual inquiry as to legislative intent into a conclusive presumption of law.

Garrett v. United States, 471 U.S. 773, 778-79 (1985) (emphasis in original). *See also Brown v. Commonwealth*, 230 Va. 310, 313-14, 337 S.E.2d 711, 713 (1985). A *Blockburger* analysis is preferred by courts generally as it maximizes

judicial economy, providing an answer without resorting to a more detailed examination of legislative intent. However, the Commonwealth here agreed with appellant that the *Blockburger* test did not allow multiple punishments here.

In this case, therefore, the issue is whether "the General Assembly has 'clearly indicated its intent to impose multiple punishments.' " *Fitzgerald v. Commonwealth*, 223 Va. 615, 635, 292 S.E.2d 798, 810 (1982) (quoting *Turner v. Commonwealth*, 221 Va. 513, 530, 273 S.E.2d 36, 47 (1980)). The structure of the Code, the language of the statutes, legislative history, and the logical implications of each interpretation assist in making this determination.[4] *See Garrett*, 471 U.S. at 779 & 785; *Fitzgerald*, 223 Va. at 636-37, 292 S.E.2d at 810-11.

Although determining legislative intent is "a factual inquiry," *Garrett*, 471 U.S. at 779, this analysis involves an examination of the offenses "in the abstract, rather than with reference to the facts of the particular case under review," *Blythe v. Commonwealth*, 222 Va. 722, 726, 284 S.E.2d 796, 798 (1981). Therefore, *de novo* review of the trial court's ruling is appropriate. *Contrast Robinson v. Commonwealth*, 17 Va. App. 551, 555, 439 S.E.2d 622, 624-25, *aff'd en banc*,

4. The failure of the General Assembly to include specific language indicating prosecution of both DUI and involuntary manslaughter arising out of the same incident is permissible does not control our analysis. *See Garrett*, 471 U.S. at 793. The failure to find any direct legislative history is not controlling either. *See, e.g., Whalen*, 445 U.S. at 690 (noting "legislative history . . . sheds no light on [this double jeopardy] question" and then continuing the analysis).

18 Va. App. 814, 447 S.E.2d 542 (1994) (deferring to a trial court's factual finding of no prosecutorial misconduct in deciding whether double jeopardy principles prevented retrial of a defendant) *with Stephens v. Commonwealth*, 35 Va. App. 141, 145-47, 543 S.E.2d 609, 611 (2001) (discussing the double jeopardy prohibition against multiple punishments for the same offense without deference to the trial court's ruling) *and Spain v. Commonwealth*, 7 Va. App. 385, 391-92, 373 S.E.2d 728, 731-32 (1988) (determining the General Assembly's intent without deference to the trial court's ruling in a case involving multiple punishments). *See also Gatlin Oil Co., Inc. v. United States*, 169 F.3d 207, 210 (4th Cir. 1999) ("Because, at this stage of the proceedings, this case turns on the proper interpretation of the Act, we review the district court's judgment *de novo.*"); *People v. Dillard*, 631 N.W.2d 755, 757 (Mich. Ct. App. 2001) ("A double jeopardy challenge involves a question of law that this Court reviews de novo.").

For this analysis, "[the] starting point must be the language of the statutes." *Albernaz*, 450 U.S. at 336. Code § 18.2-36.1(A), initially enacted in 1989, reads: "Any person who, as a result of driving under the influence *in violation of* clause (ii), (iii), or (iv) of Code § 18.2-266 or any local ordinance substantially similar thereto unintentionally causes the death of another person, shall be guilty of involuntary manslaughter." (Emphasis added.) We presume the legislature was aware of similar language within the Code and the courts' interpretations of that language when drafting this statute.

> Legislative intent may also be gleaned by consulting other statutes "using the same phraseology,"

Appendix B

> [*Gilliam v. Commonwealth*, 21 Va. App. 519, 523, 465 S.E.2d 592, 594 (1996)], and "statutes which relate to the same subject matter should be read, construed and applied together. . . ." *Alger v. Commonwealth*, 19 Va. App. 252, 256, 450 S.E.2d 765, 767 (1994).

Rasmussen v. Commonwealth, 31 Va. App. 233, 238, 522 S.E.2d 401, 403 (1999). *See also United States v. Johnson*, 32 F.3d 82, 86 (4th Cir. 1994) ("We may 'assume that our elected representatives . . . know the law.' " (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-97 (1979))).

A comparison of the language in Code § 18.2-36.1 and the language of several Virginia murder statutes indicates the General Assembly intended to allow multiple punishments for violations of this manslaughter section and the DUI statute.

The language in Code § 18.2-36.1 is similar to the language used in several murder statutes that reference other crimes as an element of the murder offense. For example, the first degree murder statute requires, in similar language, proof that the killing was committed "*in the commission of*, or attempt to commit, arson, rape, forcible sodomy, inanimate or animate object sexual penetration, robbery, burglary or abduction." Code § 18.2-32 (emphasis added). The felony murder statute also uses similar language, requiring that the killing occur "*while in the prosecution of some felonious act* other than those specified in §§ 18.2-31 and 18.2-32." Code § 18.2-33 (emphasis added.) Clearly, the language of Code § 18.2-36.1 is similar to the language of these murder statutes.

None of these statutes expressly allows multiple punishments for the underlying offenses. However, Virginia case law has interpreted this type of language to allow the simultaneous prosecution and conviction of felony murder as well as the underlying felony upon which the murder charge is based. In *Fitzgerald*, for example, the Supreme Court, without relying on *Blockburger*, found the General Assembly did not intend to eliminate punishment of the underlying offenses when it enacted the capital murder statute. 223 Va. at 635-37, 292 S.E.2d at 810-11. This Court then applied the analysis in *Fitzgerald* to "conclude that double jeopardy was not violated when [a defendant] was convicted, in a single trial, of both felony murder in violation of Code § 18.2-32 and the underlying felony." *Spain*, 7 Va. App. at 391-92, 373 S.E.2d at 731-32.

Additionally, the purpose behind this language is the same in the felony murder statutes and in Code § 18.2-36.1. For a conviction under Code §§ 18.2-32 and -33, the Commonwealth is not required to prove malice, a traditional element of murder, but need only prove the commission of the underlying felony to supply this criminal intent element. As the Supreme Court explained:

> While § 18.2-32 contemplates a "killing with malice", the malice intrinsic in the commission of one of the predicate felonies "provides the malice prerequisite to a finding that the homicide was murder." *Wooden v. Commonwealth*, 222 Va. 758, 762, 284 S.E.2d 811, 814 (1981). The same imputation of malice is implicit in § 18.2-33 which contemplates an accidental killing. . . .

Heacock v. Commonwealth, 228 Va. 397, 403, 323 S.E.2d 90, 93 (1984). *See also Commonwelth v. Montague*, 260 Va. 697, 700, 536 S.E.2d 910, 912 (2000) (discussing Code § 18.2-33).

Likewise, while the Commonwealth is required to prove criminal negligence for a common law involuntary manslaughter conviction,[5] *Darnell v. Commonwealth*, 6 Va. App. 485, 491, 370 S.E.2d 717, 720 (1988) (holding "that criminal negligence is an essential element of involuntary manslaughter"), under Code § 18.2-36.1(A), no proof of criminal negligence is required.[6] Clearly, the purpose of both the felony murder statute and Code § 18.2-36.1 is to allow the Commonwealth to prove a traditional element of the offenses, the mindset or intent of the accused, by substituting the violation of a different statute for direct proof of the element. Given the similar purpose and the similar language in these statutes, we must conclude the General Assembly similarly intended to allow multiple punishments for violations of both Code § 18.2-36.1 and the underlying DUI, just as it did for felony murder and the underlying felony. *See Spain*, 7 Va. App. at 391-92, 373 S.E.2d at 731-32.

Additionally, the language of Code § 18.2-36.1 indicates the legislature did not intend to preclude prosecution of drunk

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5. Code § 18.2-36 establishes the penalty for involuntary manslaughter but does not define the crime.

6. Under Code § 18.2-36.1(B), if the Commonwealth can prove criminal negligence as well as a violation of Code § 18.2-266(ii), (iii), or (iv), then a defendant can be convicted of aggravated involuntary manslaughter.

driving charges. This section refers only to subsections (ii), (iii), and (iv) of Code § 18.2-266[7]; subsection (i), which establishes a .08 percent blood alcohol concentration as a per se violation of the DUI statute, is not mentioned. Under Code § 18.2-36.1, therefore, the Commonwealth cannot rely on the presumption in Code § 18.2-266(i) to convict a defendant, but instead must prove he was under the influence as proscribed in subsections (ii), (iii), (iv).

Accordingly, as appellant concedes, a defendant who was convicted of DUI under Code § 18.2-266(i) clearly can be convicted of involuntary manslaughter in violation of Code § 18.2-36.1 without violating double jeopardy principles. We find no indication that the legislature intended to

7. Code § 18.2-266 reads, in part,

> It shall be unlawful for any person to drive or operate any motor vehicle, engine or train (i) while such person has a blood alcohol concentration of 0.08 percent or more by weight by volume or 0.08 grams or more per 210 liters of breath as indicated by a chemical test administered as provided in this article, (ii) while such person is under the influence of alcohol, (iii) while such person is under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature, or any combination of such drugs, to a degree which impairs his ability to drive or operate any motor vehicle, engine or train safely, or (iv) while such person is under the combined influence of alcohol and any drug or drugs to a degree which impairs his ability to drive or operate any motor vehicle, engine or train safely. A charge alleging a violation of this section shall support a conviction under clauses (i), (ii), (iii) or (iv).

allow multiple punishments when subsection (i) is violated, but not when subsections (ii), (iii), or (iv) are violated. Such disparate results are not warranted, especially given the legislative purpose of these statutes is to provide the maximum deterrent to drunk drivers.[8] *See State v. McCovey*, 803 P.2d 1234, 1239 (Utah 1990) (explaining that to apply double jeopardy principles to felony murder and aggravated robbery convictions allows a "windfall" to a defendant who is charged with felony murder as opposed to another type of killing). We do not believe the General Assembly intended to give appellant such a "windfall."

The General Assembly clearly intended to allow multiple punishments in this case. For the reasons stated above, we affirm the conviction.

Affirmed.

A Copy,
Teste:
Cynthia L. McCoy, Clerk

By: [illegible]
Deputy Clerk

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8. Appellant conceded this legislative purpose during oral argument.

APPENDIX C — OPINION OF THE COURT OF APPEALS OF VIRGINIA DATED FEBRUARY 28, 2001

VIRGINIA:

In the Court of Appeals of Virginia on Wednesday the 28th day of February, 2001

Record No. 2524-00-1
Circuit Court No. CR99-4945

Mario Udasco Dalo,

Appellant,

against

Commonwealth of Virginia,

Appellee.

From the Circuit Court of the City of Virginia Beach
Before Chief Judge Fitzpatrick

This petition for appeal has been reviewed pursuant to Code § 17.1-407(C) and is granted in part and denied in part. An appeal is awarded to the petitioner from a judgment of the Circuit Court of Virginia Beach, dated October 4, 2000, with respect to the following questions:

I. Whether, where appellant has already been convicted of violating Code § 18.2-266 under "subsection (ii), (iii) or (iv)," a conviction for violating Code § 18.2-36.1(A),

premised on the same Code § 18.2-266 violation, would be barred by and constitute double jeopardy.

II. Whether the trial court erred in overruling appellant's motion to dismiss the involuntary manslaughter indictment based on double jeopardy principles on the basis of non-existent legislative intent that the trial court found authorized it to impose multiple punishments for the same criminal conduct.

Appeal bond or an irrevocable letter of credit in the amount of $500 shall be posted as required by Code § 8.01-676.1(B). The clerk is directed to certify this action to the trial court and to all counsel of record.

Pursuant to Rule 5A:25, an appendix is required in this appeal and shall be filed by the appellant at the time of the filing of the opening brief.

The remainder of the petition for appeal is denied for the following reason:

III. Appellant argues that, in its ruling on the double jeopardy issue, the trial court violated basic rules of statutory construction, created new law, and violated the separation of powers by overstepping its own jurisdictional powers as a judiciary. However, the record does not indicate appellant presented this argument to the trial court. "The Court of Appeals will not consider an argument on appeal which was not presented to the trial court." *Ohree v. Commonwealth*, 26 Va. App. 299, 308, 494 S.E.2d 484, 488 (1998). *See* Rule 5A:18. Accordingly, Rule 5A:18

bars our consideration of this question on appeal. Moreover, the record does not reflect any reason to invoke the good cause or ends of justice exceptions to Rule 5A:18.

This order is final unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code § 17.1-407(D) and Rule 5A:15(a). If appellant files a demand for consideration by a three-judge panel, the demand should include a statement, not to exceed one typewritten page, identifying how this order is in error.

A Copy,

Teste:

s/ Cynthia L. McCoy,
Clerk

APPENDIX D — SENTENCING ORDER OF THE CIRCUIT COURT OF VIRGINIA BEACH ENTERED OCTOBER 4, 2000

VIRGINIA: IN THE CIRCUIT COURT OF VIRGINIA BEACH

SENTENCING ORDER — CASE NO.: CR99-4945

HEARING DATE : SEPTEMBER 25, 2000
JUDGE : SHOCKLEY

COMMONWEALTH OF VIRGINIA
vs
MARIO UDASCO DALO, DEFENDANT
SSN : 547-84-6695
DOB : 3/25/47
SEX : MALE

Attorney for the Commonwealth: R. Reel & M. Capoldo
Attorney for the Defendant: S. Frucci
Court Reporter: Ronald Graham and Associates, Inc.

The defendant was present and represented by counsel.

The defendant on 8/1/00 entered a conditional plea pursuant to § 19.2-254.

On, 8/1/00 the defendant was found GUILTY of the following offense(s):

OFFENSE (F/M)	*DATE*	*SECTION*
Involuntary Manslaughter(F)	10/6/99	18.2-36.1

Appendix D

The presentence report was considered and filed as part of the record in accordance with the provisions of Code § 19.2-299.

The Court reviewed and considered the applicable discretionary sentencing guidelines and made the completed worksheet a part of the record of the case pursuant to the provisions of Code § 19.2-298.01.

The Statewide Community-Based Corrections System Report was filed.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced.

The Court **SENTENCES** the defendant to:

Incarceration in the Virginia Department of Corrections for the term of: 10 years.

The Court **SUSPENDS** 4 years of the sentence conditioned on the following:

1. **Good behavior.** The defendant shall be of good behavior for 10 years.

2. **Supervised Probation.** The defendant is placed on Supervised Probation and the defendant shall comply with all the rules and requirements set by the Probation Officer. LENGTH OF PROBATION:

Until released by the Probation Officer. PROBATION TO BEGIN: Upon release from confinement.

3. **Restitution.** The defendant shall pay restitution as follows: $406.72 to Ocean Park Volunteer Rescue Squad within 60 days.

Distribution of Copies. The Clerk shall send a copy of this order to the:

Sheriff
Director of the Department of Corrections
Sentencing Guideline Committee
Porbation Officer of this Court

Payment after release. $348.00 Costs. Payment to be made after defendant's relase from confinement.

Credit provision when time to be served. The defendant shall be given credit for time spent in confinement while awaiting trial pursuant to § 53.1-187.

The defendant expressed an intention to appeal this case to the Court of Appeals, upon written notice of Appeal, the judgment of this Court shall be stayed. The Court set a $20,000.00 appeal bond.

ENTERED: 10/4/00

s/ [illegible]
JUDGE